Dec 10 1877
Submitted
6-168

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 356.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 15, 1876.

allowed $306-60
Dec 15 1877
Affirmed
J M Brawley

SUPREME COURT OF THE UNITED STATES.

No. 356.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed January 15, 1872	1	1
Traverse	9	4
Amended petition, filed December 1, 1873	10	5
Final judgment by the court	18	9
Application for allowance of appeal	19	9
Order allowing same	21	10
Findings of fact by the court	22	10
Conclusion of law	24	12
Opinion of the court	24	12
Requests for additional findings by defendants, and rulings of the court thereon	31	18
Certificate	34	19

	Original.	Print.
	1	1
	3	4
	10	6
	18	9
	19	9
	20	10
	22	12
	24	12
	24	12
	24	12
	24	12
	25	13
	26	13
	27	14
	28	14
	29	15
	31	16
	34	17

1 Court of Claims of the United States. December term, 1871.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK,
against
THE UNITED STATES.
No. 6410.

Petition.—Filed January 15, 1872.—*J. R.*

Daniel F. Brawley, respectfully complaining, shows to this honorable court, and states, that he is a citizen of the United States, and a resident of the State of Minnesota, and that Nathan Myrick, for whose use this action is brought, is also a citizen of the United States, and a resident of the State of Minnesota, and that heretofore, on or about the sixth day of May, A. D. 1871, Lieutenant-Colonel S. B. Holabird, United States Army, and deputy quartermaster-general of said Army, chief quartermaster of the military department of Dakota, in the service of the United States of America, and acting for and on behalf of said United States, did make and enter into a contract and obligation, in writing, to and with Daniel F. Brawley, complainant, in the words and figures following, viz:

Articles of agreement entered into this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-one, (1871,) between Lieut. Col. S. B. Holabird, deputy quartermaster-general U. S. A., chief quartermaster of the military department of Dakota, an officer in
2 the service of the United States of America, or his successor, of the first part, and Daniel F. Brawley, his heirs and assignees, of Fort Pembina, county of Pembina, in the Territory of Dakota, of the second part. This agreement witnesseth, that the said Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general U. S. A., for and on behalf of the United States of America, and the said Daniel F. Brawley, his, for himself, his heirs, assignees, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

I. That the said Daniel F. Brawley, his heirs, assignees, administrators, and executors, shall sell, furnish, and deliver, cut and split in lengths of four (4) feet, duly piled or corded, under the direction and supervision of the post quartermaster, within the enclosure of the post of Fort Pembina, D. T., eight hundred and eighty (880) cords of sound, of first quality, of merchantable oak wood, more or less, as shall be determined to be necessary, by the post-commander, for the regular supply, in accordance with Army regulations, of the troops and employés of the garrison of said post, for the fiscal year beginning July 1st, 1871, and ending June 30th, 1872. The delivery of eight hundred and eighty (880) cords to be completed on or before January 1st, 1872; but any additional number of cords of wood that shall be required, over and above that amount, may be delivered from time to time, regulated by the proper military authorities, based upon the actual necessities of the troops for the period above mentioned; provided, that if the wood be less than four (4) feet in length, due allowance shall be made for such shortage by an increased quantity, the cubical contents of the wood being measured in all cases. Delivery on this contract to begin on or before July 15th, 1871, unless the time be extended by the commanding officer of the post.

II. That the said wood shall be subject to such inspection as the said Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general U. S.

3 A., party of the first part, may deem necessary to determine the quality, quantity, and condition at time of delivery, and whether the terms of this contract have been fully complied with.

The inspection shall be made as the wood is delivered, by one or more officers, and, after delivery, by a board of officers, to consist of three company commanders, if present, or of such company commanders less than three, and such company officers next in rank, as shall complete the number, and no payment shall be made without the proceedings of such board be attached to the voucher in each case, unless modified by the special authority of the department commander.

III. That in case of failure on the part of the said Daniel F. Brawley, his agents, heirs, and assignees, party of the second part, to deliver at any part of the eight hundred and eighty (880) cords, more or less, of wood, as stipulated by this contract, then the said Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general U. S. A., his agent or successor, party of the first part, shall have power to supply the deficiency, by purchase or otherwise, and the said Daniel F. Brawley, his heirs and assignees, party of the second part, shall pay the difference in cost, using any money due the contractor at the time of such failure, to pay the difference on supplying the deficiency above mentioned.

IV. That payment shall be made, in the customary manner, upon the delivery of the wood, as stipulated in article I of this agreement, provided the voucher is complete, reciting that the wood has been measured and inspected, as required, and has the approval of the post or department commander, as stipulated in article II of this agreement; and provided, that the contractor be not indebted to the Government at the time, under article III of this agreement, in the funds furnished by the United States for public disbursement, and in the event of the quartermaster contracting being without funds for this purpose when payment is due, then payment shall be made as soon thereafter as funds shall be received by him for that purpose.

4 V. That the said Daniel F. Brawley, party of the second part, shall receive the sum of three dollars and ninety-nine cents ($3.99) per cord for each and every cord of wood delivered and accepted, as stipulated in articles I and II of this agreement; and that at any time when two hundred (200) cords of wood have been delivered, inspected, and received, a voucher may be given and payment made for one hundred (100) cords of the same, and thereafter for such amount as may be delivered until the final delivery, when the one hundred (100) cords retained shall be paid for on final settlement.

VI. It is expressly stipulated that Daniel F. Brawley shall have full and sufficient authority to cut wood upon any part of the military reservation outside of a circle described with a radius of half a mile from the adjutant's office, or upon any public lands adjoining the military reservation not appropriated by law to any other use. The said Daniel F. Brawley shall be allowed to herd and graze his animals at any point without the circle above described, or within it whenever the post-commander shall permit or authorize the same. That said Daniel F. Brawley may build yards, sheds, stables, or shanties, of a temporary nature, found to be necessary in the execution of this contract, to be used for this specific purpose and no other; and at the expiration of this contract all such buildings and appurtenances shall be removed or abandoned. For such occupation of land upon the reservation the sum of one dollar ($1.00) per month shall be deducted by the post-quartermaster upon the last payment under his contract.

VII. That the said Daniel F. Brawley, party of the second part, shall

be entitled to military protection whenever, from the hostilities of the Indians, it may be deemed necessary by the post-commander, whose duty it shall be to furnish such protection to the extent of his power; this stipulation to give no foundation for any claim against the
5 Government for damages from Indians, or any detriment arising from their depredations or hostilities.

VIII. It is expressly stipulated and agreed between the parties to this contract that upon mutual agreement it may be extended, or reduced, changed, altered, modified, or abrogated, in whole or in part; but no such extention or reduction, change, alteration, modification, or abrogation shall be interpreted as entitling the contractor to an increased rate over the rate specified in Article V of this agreement.

IX. That no members of Congress, officer or agent of the Government, or any person employed in the public service, shall be admitted to any share herein, or to any benefit which may arise herefrom.

X. That this contract is made subject to the approval of the commanding generals of the Department of Dakota and of the Military Division of the Missouri.

In witness whereof the undersigned have hereunto placed their hands and seals the day and year first above written.

(Signed) S. B. HOLABIRD, [SEAL.]
Deputy Quartermaster-General, U. S. A.
DANIEL F. BRAWLEY, [SEAL.]
of Pembina Co., D. T.

In presence of—
W. G. YOUNG.

And the complainant alleges that said contract was entered into, made, and executed in all respects as required by law; that a long time, to wit, eight weeks, previous to date of said contract, Captain Wheaton of the Twentieth Regiment of Infantry, United States Army, commanding at that time the military post of Fort Pembina, made and forwarded to said Lieutenant-Colonel S. B. Holabird, chief quar-
6 termaster as aforesaid, an estimate and requisition for said eight hundred and eighty cords of wood, for the use of the Army at said post during the fiscal year ending June thirtieth, A. D. 1872. That thereupon said S. B. Holabird, deputy quartermaster-general, United States Army, acting for and on behalf of the United States, did advertise in the public newspapers for proposals to furnish said wood, and that the complainant, in response to such notice and advertisement, did propose to furnish the same for three dollars and ninety-nine cents per cord, upon condition specified in said contract, and the said proposal was the lowest made to said Holabird; and that thereupon said contract was awarded to him as the lowest and best responsible bidder for furnishing said wood, and that the said contract was entered into pursuant to said award.

And the complainant further alleges that after the execution of said contract, and on or about the first day of May, A. D. 1871, for a valuable consideration to him paid by Nathan Myrick, he did assign and transfer to said Myrick the said contract, and all his right, title, and interest therein, and authorized him to receive all moneys that might become due thereon, or by virtue thereof, and in consideration of said premises said Nathan Myrick agreed to perform all the stipulations and conditions of said contract by him to be kept and performed.

And that thereupon said Nathan Myrick immediately made preparations for the execution of said contract according to its terms and con-

ditions, and to that end he did employ a large number of men to cut and pile said wood, and did purchase and transport from the nearest available point, which was S't Cloud, Minnesota, more than three hundred miles distant, at great expense, oxen, wagons, chains, forage, subsistence, and other materials, to enable him to execute said contract, and that he therein and thereby incurred all the expense and liability necessary to the complete execution of said contract, and that all said wood was cut and hauled as required therein.

And the complainant further alleges that after all said expense had been incurred, and all said wood cut, and all said preparations
7 made for the complete execution of said contract, with the full knowledge of said Captain Wheaton, commanding officer of said post, Fort Pembina, and on or about the first day of July, A. D. 1871, the said commanding officer did notify the complainant and said Nathan Myrick that but forty cords of wood would be required at said post for the year ending June 30, A. D. 1872, and did then and there refuse to receive or pay for more than forty cords under said contract, and that said officer and said deputy quartermaster-general have refused to receive or pay for any more than said forty cords, and that their action in this behalf has been approved by Major-General W. S. Haucock, commanding the Department of Dakota.

And the complainant further alleges that said Fort Pembina is situated on the remote frontier, more than one hundred miles removed from all civilization, or market for wood, and that the wood cut and hauled under said contract is without any market value, or any value whatever.

And the complainant further alleges that both himself and the said Nathan Myrick have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government; wherefore the complainant demands judgment against the United States for the sum of three thousand three hundred and fifty-one dollars and sixty cents for the use of said Nathan Myrick.

SANBORN & KING,
Att'ys for Complainant.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

John B. Sanborn, first duly sworn, deposes and says that he is one of the attorneys for the claimant in the above action; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made except as in said petition stated, and that said claimant is justly entitled to the amount therein claimed from the United
8 States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

JOHN B. SANBORN.

Subscribed and sworn to before me this 11th day of January, 1872.
[SEAL] H. E. MANN,
Clerk U. S. Circuit Court, District of Minnesota.

9 In the United States Court of Claims.—December term, A. D. 1871.

DANIEL F. BRAWLEY, FOR THE USE OF Nathan Myrick,
vs.
THE UNITED STATES.
} No. 6410.

And the said defendants, by their Attorney-General, come and make

answer to the petition of the claimant on file herein, and, not confessing the same or any part thereof, do hereby most expressly deny each and every the allegations therein contained and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States are indebted to said claimant in the sum of three thousand three hundred and fifty-one dollars and sixty cents, the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against said Government, the said defendants deny the truth of said allegation, and call for proof thereof.

WILLIAM McMICHAEL,
Assistant Attorney-General.

Filed March 29, 1872.

10 Court of Claims of the United States, December term, 1871.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN Myrick,
against
THE UNITED STATES. } No. 6410.

Amended petition.—Filed Dec. 1, 1873.

Daniel F. Brawley, respectfully complaining, shows to this honorable court and states that he is a citizen of the United States, and a resident of the State of Minnesota, and that Nathan Myrick, for whose use this action is brought, is also a citizen of the United States, and a resident of the State of Minnesota, and that heretofore, on or about the sixth day of May, A. D. 1871, Lieutenant-Colonel S. B. Holabird, United States Army, and deputy quartermaster-general of said Army, chief quartermaster of the Military Department of Dakota, in the service of the United States of America, and acting for and on behalf of said United States, did make and enter into a contract and obligation, in writing, to and with Daniel F. Brawley, complainant, in the words and figures following, viz:

Articles of agreement entered into this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-one, (1871,)
11 between Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general United States Army, chief quartermaster of the Military Department of Dakota, an officer in the service of the United States of America, or his successor, of the first part, and Daniel F. Brawley, his heirs and assignees, of Fort Pembina, county of Pembina, in the Territory of Dakota, of the second part. This agreement witnesseth, that the said Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general, United States Army, for and on behalf of the United States of America, and the said Daniel F. Brawley, his, for himself, his heirs, assignees, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

I. That the said Daniel F. Brawley, his heirs, assignees, administrators, and executors, shall sell, furnish, and deliver, cut and split in lengths of four (4) feet, duly piled or corded under the direction and supervis-

ion of the post-quartermaster, within the enclosure of the post of Fort Pembina, Dakota Territory, eight hundred and eighty (880) cords of sound, of first quality, of merchantable oak wood, more or less, as shall be determined to be necessary, by the post-commander, for the regular supply, in accordance with Army regulations, of the troops and employés of the garrison of said post, for the fiscal year beginning July 1st, 1871, and ending June 30th, 1872. The delivery of eight hundred and eighty (880) cords to be completed on or before January 1st, 1872, but any additional number of cords of wood that may be required over and above that amount may be delivered from time to time, regulated by the proper military authorities, based upon the actual necessities of the troops for the period above mentioned; provided, that if the wood be less than four (4) feet in length, due allowance shall be made for such shortage by an increased quantity, the cubical contents of the wood being measured in all cases. Delivery on this contract to begin on or before July 15th, 1871, unless the time be extended by the commanding officer of the post.

12 II. That the said wood shall be subject to such inspection as the said Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general, United States Army, party of the first part, may deem necessary to determine the quality, quantity, and condition at time of delivery, and whether the terms of this contract have been fully complied with.

The inspection shall be made as the wood is delivered by one or more officers, and, after delivery, by a board of officers, to consist of three company commanders, if present, or of such company commanders less than three, and of such company officers next in rank, as shall complete the number, and no payment shall be made without the proceedings of such a board be attached to the voucher in each case, unless modified by the special authority of the department commander.

III. That in case of failure on the part of the said Daniel F. Brawley, his agents, heirs, and assignees, party of the second part, to deliver at any part of the eight hundred and eighty (880) cords, more or less, of wood, as stipulated by this contract, then the said Lieutenant-Colonel S. B. Holabird, deputy quartermaster-general U. S. A., his agent or successor, party of the first, shall have power to supply the deficiency by purchase, or otherwise, and the said Daniel F. Brawley, his heirs and assignees, party of the second part, shall pay the difference in cost, using any money due the contractor at the time of such failure, to pay the difference on supplying the deficiency above mentioned.

IV. That payments shall be made in the customary manner upon the delivery of the wood, as stipulated in article I of this agreement, provided the voucher is complete, reciting that the wood has been measured and inspected as required, and has the approval of the post or department commander, as stipulated in article II of this agreement, and provided that the contractor be not indebted to the Government at the time, under article III of this agreement, in the funds furnished

13 by the United States for public disbursement, and in the event of the quartermaster contracting being without funds for this purpose when payment is due, then payment shall be made as soon thereafter as funds shall be received by him for that purpose.

V. That the said Daniel F. Brawley, party of the second part, shall receive the sum of three dollars and ninety-nine cents (3.99) per cord for each and every cord of wood delivered and accepted, as stipulated in articles I and II of this agreement; and that at any time when two hundred (200) cords of wood have been delivered, inspected, and re

ceived, a voucher may be given, and payment made for one hundred (100) cords of the same, and thereafter for such amount as may be delivered until the final delivery, when the one hundred (100) cords retained shall be paid for on final settlement.

VI. It is expressly stipulated that Daniel F. Brawley shall have full and sufficient authority to cut wood upon any part of the military reservation outside of a circle described with a radius of half a mile from the adjutant's office, or upon any public lands adjoining the military reservation not appropriated by law to any other use. The said Daniel F. Brawley shall be allowed to herd and graze his animals at any point without the circle above described, or within it, whenever the post-commander shall permit or authorize the same. That said Daniel F. Brawley may build yards, sheds, stables, or shanties of a temporary nature, found to be necessary in the execution of this contract, to be used for this specific purpose, and no other; and at the expiration of this contract all such buildings and appurtenances shall be removed or abandoned. For such occupation of land upon the reservation the sum of one dollar ($1.00) per month shall be deducted by the post quartermaster upon the last payment under his contract.

14 VII. That the said Daniel F. Brawley, party of the second part, shall be entitled to military protection whenever, from the hostilities of the Indians, it may be deemed necessary by the post-commander, whose duty it shall be to furnish such protection to the extent of his power; this stipulation to give no foundation for any claim against the Government for damages from Indians, or any detriment arising from their depredations or hostilities.

VIII. It is expressly stipulated and agreed between the parties to this contract that upon mutual agreement it may be extended, or reduced, changed, altered, modified, or abrogated, in whole or in part; but no such extension or reduction, change, alteration, modification, or abrogation shall be interpreted as entitling the contractor to an increased rate over the rate specified in article V of this agreement.

IX. That no members of Congress, officer, or agent of the Government, or any person employed in the public service shall be admitted to any share herein, or to any benefit which may arise herefrom.

X. That this contract is made subject to the approval of the commanding generals of the Departments of Dakota and of the Military Division of the Missouri.

In witness whereof the undersigned have hereunto placed their hands and seals the day and year first above written.

(Signed) S. B. HOLABIRD, [SEAL.]
Deputy Quartermaster-General, U. S. A.
DANIEL F. BRAWLEY, [SEAL.]
of Pembina Co., D. T.

In presence of—
W. G. YOUNG.

And the complainant alleges that said contract was entered into, made, and executed in all respects as required by law; that a

15 long time, to wit, eight weeks, previous to date of said contract, Captain Wheaton, of the Twentieth Regiment of Infantry, United States Army, commanding at that time the military post of Fort Pembina, made and forwarded to said Lieutenant-Colonel S. B. Holabird, chief quartermaster as aforesaid, an estimate and requ'sition for said eight hundred and eighty cords of wood, for the use of the Army at said post during the fiscal year ending June 30th, A. D. 1872. That there-

upon said S. B. Holabird, deputy quartermaster-general United States Army, acting for and on behalf of the United States, did advertise in the public newspapers for proposals to furnish said wood, and that the complainant, in response to such notice and advertisement, did propose to furnish the same for three dollars and ninety-nine cents per cord, upon condition specified in said contract, and that said proposal was the lowest made to said Holabird; and that thereupon said contract was awarded to him, as the lowest and best responsible bidder for furnishing said wood, and that the said contract was entered into pursuant to said award.

And the claimant further alleges that immediately upon the execution of said contract *that* he did, by himself and his agents and servants, make preparation for the execution of the same according to its terms and conditions, and to that end did employ a large number of men to cut and pile said wood, and did purchase and transport from the nearest available point, which was Saint Cloud, Minnesota, more than three hundred miles distant, at great expense, oxen, wagons, chains, forage, subsistence, and other materials, to enable him to execute said contract; and that he therein and thereby incurred all the expense and liability necessary to the complete execution of said contract, and that all said wood was cut and hauled as required therein.

And the claimant further alleges that after all said expense had been incurred, and all said wood cut, and all said preparations made
16 for the complete execution of said contract, with the full knowledge of said Captain Wheaton, commanding officer of said post, Fort Pembina, and on or about the first day of July, A. D. 1871, the said commanding officer did notify the complainant that but forty cords of wood would be required at said fort for the year ending June 30th, A. D. 1872, and did then and there refuse to receive or pay for more than forty cords under said contract; and that said officer, said deputy quartermaster-general, and the United States have refused to receive or pay for more than said forty cords.

And the claimant further alleges that said Fort Pembina is situated on the remote frontier, more than one hundred miles removed from all civilization or market for wood, except for small amounts for steamboats navigating the Red River of the North, and that the rate paid by said steamboats for such small quantities of wood does not exceed two dollars per cord on the bank of said river, and that beyond this small demand for boats said wood so cut and hauled under said contract is without any market value or any value whatever, and that no part of the same has been sold.

And the claimant further alleges that in consideration of money advanced, labor performed, and material furnished to him in the performance of said contract by Nathan Myrick, he has transferred this claim and the money to be recovered thereon to said Nathan Myrick.

And the claimant further alleges that both himself and Nathan Myrick have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

Wherefore the claimant demands judgment against the United States for the sum of three thousand three hundred and fifty-one dollars and sixty cents for the use of Nathan Myrick.

SANBORN & KING,
Attorneys for Claimant.

17 UNITED STATES OF AMERICA,
District of Columbia, ss:

John B. Sanborn, being first duly sworn, deposes and says that he is one of the attorneys for the claimant in the above action; that no assignment or transfer of said claim or any part thereof or any interest therein has been made, except as in said petition stated, and that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

JOHN B. SANBORN.

Subscribed and sworn to before me, this 29th day of September, A. D. 1873.

[NOTARIAL SEAL.] CHA'S CONS. CALLAN,
Notary Public, District of Columbia.

Post-office address of claimant: Pembina, Dakota Territory.
Post-office address of attorneys: Washington, D. C.

18 In the Court of Claims.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK, *vs.* THE UNITED STATES. } 6410.

At a Court of Claims held at the Capitol in the city of Washington, the 10th day of January, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

19 In the United States Court of Claims, December term, 1875.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK, *vs.* THE UNITED STATES. } No. 6410

And now comes the claimant, Daniel F. Brawley, by his attorneys, Sanborn and King, and respectfully represents to this honorable court that, as he is informed and believes, errors have occurred to his prejudice in the proceedings, finding, and judgment of this court in said cause, and he assigns the following as errors that have been committed therein, viz:

1. That said court found and determined that said contract between the claimant and defendants was for the delivery of so much wood
20 only as should be determined to be necessary by the post-commander for the supply in accordance with the Army Regulations of the troops and employés of the garrison of said fort for the fiscal year beginning July 1, 1871, and ending June 30, 1872, instead of a contract for the delivery of eight hundred and eighty cords of wood, as claimed by the plaintiff.

2. And said court committed error in this, that it adjudged and determined that the claimant's petition be dismissed, whereas it is claimed

that it should have adjudged that the claimant should have and recover of the defendants the contract-price of eight hundred and forty cords of wood, as prescribed in and by the terms of said contract.

Wherefore the claimant respectfully petitions this honorable court that an appeal may be allowed to the Supreme Court of the United States as provided by law.

SANBORN AND KING,
Claimant's Attorneys.

Filed, Feb. 9, 1876.

21 In the Court of Claims of the United States, Dec. term, 1875.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN Myrick,
vs.
THE UNITED STATES. } No. 6410.

M'r Sanborn, for the claimant, presented an application for the allowance of an appeal filed of this date, and it was ordered that the appeal be allowed as prayed for.

By the court.

FEBRUARY 9, 1876.

A true copy of record.

22 DANIEL F. BRAWLEY, FOR USE OF NATHAN Myrick,
vs.
THE UNITED STATES } 6410.

FINDINGS OF FACT BY THE COURT.

1. The contract set forth in the petition was entered into, as alleged, in pursuance of an estimate made by the proper officer of the quartermaster's department of the Department of Dakota, and after an advertisement inviting proposals therefor, and a bid made by claimant and accepted by such officer, which bid was as follows:

PEMBINA, D. T., *April 14th*, 1871.

"Lieut. PAUL HARWOOD,

"*A. A. Quartermaster, Fort Pembina, D. T.:*

"I do hereby agree to furnish, at Fort Pembina, D. T., (880) eight hundred and eighty or more cords of wood, at ($3.99) three dollars and ninety-nine cents per cord, accordance with advertisement for proposals, which is here attached.

"DANIEL F. BRAWLEY.

"Sureties: HENRY M. KENNEY, N. E. NELSON."

2. The bids were opened on the 15th of April, 1871, and the contract was awarded to the claimant May 6, 1871, of which fact he had notice; but the contract, although bearing date May 6, was not signed by the claimant until about June 14, 1871, when he executed the same, together with the bonds required, and returned them to the defendant's officers.

3. About the 18th of June, 1871, Capt. Loyd Wheaton, post commander of Fort Pembina, who then first learned of this contract, orally informed M'r Brawley that but forty cords of wood would be required

thereon, and forbid his hauling any more to the Government yard. On the 27th of June the claimant, in writing, informed the chief quartermaster of the Department of Dakota of the action of Captain Wheaton, and requested that he "might be permitted to fill the contract, or, at least, be compelled to haul the overplus which he would have on hand over forty cords."

On the 1st of July, 1871, written notice was served on the claimant, of which the following is a copy:

"HEADQUARTERS, FORT PEMBINA, D. T.,
"*July 1st*, 1871.

"M'r DANIEL F. BRAWLEY, *Pembina, D. T.:*

"SIR: I hereby respectfully inform you that the amount of wood that will be required, under your contract for supplying the post of Fort Pembina, D. T., with wood, for the fiscal year ending June 30, 1872, is (40) forty cords.

"I am, respectfully, your obedient servant,
"LOYD WHEATON,
"*Captain 20 Infantry, Commanding Post.*"

About the 11th of July, 1871, the major-general commanding the Department of Dakota disapproved the action of the post commander in limiting the quantity of wood to be received under the contract to (40) forty cords.

23 On the 29th of July, 1871, the post commander, Captain Wheaton, made a written report of the case and of his action therein, and thereupon, in August following, the major-general commanding the department caused to be indorsed on said report as follows:

"Respectfully returned. In view of the facts of the case as shown by Captain Wheaton, the department commander approves his course, and his action will be sustained. The commanding officer will notify the contractor accordingly, and take all necessary action to cause his recommendations to be carried into effect."

4. Before the contract was signed, the claimant had cut the 880 cords of wood, had taken ten ox-teams, with teamsters, wood-haulers, and supplies, from Saint Cloud and Sauk Centre, Minnesota, a distance of three hundred and sixty miles, to Pembina, for the purpose of hauling the wood, and 55 cords thereof had been hauled to the fort by permission, and with the understanding that the claimant assumed all risk regarding the acceptance of the same. And 20 cords more were hauled there by him, upon the same understanding, before he received any notice that only 40 cords would be received on the contract. Subsequently he hauled 800 cords to within about 25 rods of the fort, and left the same on land of M'r Myrick, because the wood was in danger if left in the forest where it was cut of being destroyed by the fires which annually run through that region,

5. Forty cords of wood only were received and accepted by the post-commander, and for that the claimant has been paid according to the contract.

6. The balance of the wood cut and hauled by the claimant remained where it was deposited by him until the autumn of 1873, when it was sold by said Myrick to one Stiles, a Government contractor, for $3.62\frac{1}{2}$ a cord.

In the years 1871 and 1872 the region about the fort was very thinly settled, and there was no market there for wood. On the banks of the

Red River, from 20 to 60 rods from where the wood was deposited, some of it might have been sold to steamboats in small quantities at $2 to $2.50 per cord, and it would have cost 50 cents per cord to haul it there.

7. The contract has never been assigned by the claimant Brawley. The claimant Myrick furnished all the teams and other necessaries for filling the contract, and cut, drew, and delivered all the wood hereinbefore referred to, for M'r Brawley, who was to pay him therefor out of the proceeds of the contract. And, in consideration thereof, said Brawley has transferred his claim against the defendants, and the money to be recovered thereon, to said Myrick, and has permitted this action to be brought in his name for the use of said Myrick.

The following additional facts were found by the court on request of the defendants:

1. The claimant Brawley knew that the contract had been awarded to him previously to the 14th of June, 1871, when the written articles thereof were sent to him to be executed; but the date of his first receiving notice of the award is not proved.

2. The post of Fort Pembina did not need for the fiscal year commencing July 1, 1871, more than the 40 cords of wood which were accepted by the defendants.

3. What Brawley was to pay Myrick for the 840 cords of wood which he offered to furnish on the contract does not appear.

24 CONCLUSION OF LAW.

Upon the foregoing facts the defendants are not liable, and the petition must be dismissed.

By the court.

RICHARDSON, J., delivered the opinion of the court:

The claimant Brawley entered into a written contract with the deputy quartermaster-general, chief quartermaster of the Military Department of Dakota Territory, bearing date May 6, 1871, to sell, furnish, and deliver at the post of Fort Pembina 880 cords of wood, more or less, as should be determined to be necessary by the post commander for the regular supply, in accordance with Army regulations, of the troops and employés of the garrison of said post, for the fiscal year beginning July 1, 1871.

The articles of the contract material to this case are as follows:

"I. That the said Daniel F. Brawley, his heirs, assignees, administrators, and executors, shall sell, furnish, and deliver, cut and split in lengths of four (4) feet, duly piled or corded, under the direction and supervision of the post quartermaster, within the inclosure of the post of Fort Pembina, Dakota Territory, eight hundred and eighty (880) cords of sound, of first quality, of merchantable oak wood, more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with Army regulations, of the troops and employés of the garrison of said post, for the fiscal year beginning July 1, 1871, and ending June 30, 1872. The delivery of eight hundred and eighty (880) cords to be completed on or before January 1, 1872, but any additional number of cords of wood that shall be required over and above that amount may be delivered from time to time, regulated by the proper military authorities, based upon the actual necessities of the troops for the period above mentioned; provided, that if the wood be less then four (4) feet in length, due allowance shall be made for such shortage by an increased quantity, the cubical contents of the wood

being measured in all cases. Delivery on this contract to begin on or before July 15, 1871, unless the time be extended by the commanding officer of the post."

* * * * * * *

"III. That in case of failure on the part of said Daniel F. Brawley, his agents, heirs, and assignees, party of the second part, to deliver any part of the eight hundred and eighty (880) cords, more or less, of wood, as stipulated by this contract, then the said Lieut. Col. S. B. Holabird, deputy quartermaster-general United States Army, his agent or successor, party of the first, shall have power to supply the deficiency by purchase, or otherwise, and the said Daniel F. Brawley, his heirs and assignees, party of the second part, shall pay the difference in cost, using any money due the contractor at the time of such failure to pay the difference on supplying the deficiency above mentioned."

* * * * * * *

"V. That the said Daniel F. Brawley, party of the second part, shall receive the sum of three dollars and ninety-nine cents ($3.99) per cord for each and every cord of wood delivered and accepted, as stipulated in articles I and II of this agreement; and that at any time when two hundred (200) cords of wood have been delivered, inspected, and received, a voucher may be given and payment made for one hundred (100) cords of the same, and thereafter for such amount as may be delivered until the final delivery, when the one hundred (100) cords retained shall be paid for on final settlement."

The contract was made in accordance with the requirements of
25 law after advertisements published in the newspapers inviting proposals, and the claimant Brawley was the lowest bidder. The written contract executed by the parties was duly approved by the major-general commanding the department and by the Lieutenant-General commanding the Military Division of Missouri.

The proposals were opened on the 15th day of April, and the award was made to Brawley on the 6th of May, but the formal written contract thereon was not signed by him until the 14th of June, 1871, when it was sent to him to be executed, and was by him signed and returned on or about that day.

The language of the claimant's written bid was that he agreed to "furnish at Fort Pembina 880 or more cords of wood, at $3.90 per cord, in accordance with advertisement for proposals." No copy of the advertisement referred to is in evidence, and it does not appear whether the form of the claimant's bid, followed the terms of the public notice inviting proposals or not. Nor is it material to determine what were the terms of either the advertisement or the bid, since the action is not founded thereon nor upon the award, but upon a formal written contract, carefully and artistically drawn and signed by the parties at a subsequent date, into which all previous agreements were merged, and which superseded the advertisement, bid, and award, and the obligations created thereby. It is manifest that the terms of the written contract differ materially in important particulars from those of the written bid, and that the claimant assumed thereby quite different obligations from those which he offered to undertake. But the plain language of a written contract cannot be set aside, contradicted, or varied by evidence of conversations, declarations, agreements, or writings between the parties made previously thereto. (1 Greenleaf's Evidence, §§ 275–278; Harvey vs. The United States, 8 C. C. R., 501.)

Before the 14th of June, but at what precise time it does not appear, the claimant, having learned that he was the successful bidder, cut all

of the 880 cords of wood which he supposed would be required, and engaged, employed, and moved at considerable expense and trouble, teams sufficient to transport the same to Fort Pembina, and provided men and supplies therefor. Fifty-five cords of wood had been actually hauled to the fort before the contract was signed, and between that time and the time of his receiving notice that only forty cords would be required, he hauled 20 cords more to that place. Subsequently, having the balance of the 880 cords cut, he hauled the same to within about 25 rods of the fort and left it on land of the claimant Myrick because it was not safe, by reason of fires, to leave it in the woods were it was cut.

Four days after the execution of the contract, and as soon as he knew of it, the post commander orally notified M'r Brawley that only 40 cords would be required on the contract; and on the 1st day of July, the very day on which the contract went into operation, like notice was given to the claimant in writing.

Brawley complained to the commanding general upon receiving the first notice, and that officer disapproved of the action of the post commander; but soon afterwards, upon a full written report of the case, reversed his own action, and approved of that of the post commander.

The defendant's officers received and accepted only 40 cords of wood, which have been paid for, and the claimant brings this action to recover damages for non-fulfillment of the contract on the part of the defendants in refusing to receive and accept the remaining 840 cords, which he claims he was bound to deliver and the defendants to receive. The petitioner does not attempt to prove, and does not set forth in his
26 petition, that the post commander acted fraudulently toward him, or was mistaken in estimating that only 40 cords of wood would be required by the necessities of the fort for the fiscal year commencing July 1, 1871, and the court expressly finds that no more was needed. The petitioner therefore relies wholly upon a construction of the contract, by which he maintains that the defendants were bound to receive and accept the full 880 cords mentioned therein, excepting only a slight variation from that quantity either way, provided for by the words "more or less," the force and effect of which he would thus limit to a small procentage of the quantity mentioned.

There is no express agreement to be found anywhere in the contract that the defendants would accept 880 cords of word, or any other quantity, from the claimant; while, on his part, he covenanted to sell, furnish, and deliver, cut, split, piled, and corded, that quantity, more or less, as should be determined by the post-commander to be necessary for the fort. When a contract of this kind between the United States and a contractor is thus unilateral in its express agreements, it has been held that the implied obligation of the United States to receive and accept is co-extensive with the express obligation of the contractor to deliver the articles specified. Such seems to have been the opinion of the Supreme Court, as expressed in Speed's case, 8 Wallace, 77. And this court expressly so decided in Caldwell's case, 8 C. C. R., 335. The judgment in that case was reversed, on appeal by the Supreme Court, on other grounds, and this point was not again considered there.

It is necessary, therefore, to determine what were the obligations of the contractor Brawley in order to ascertain the legal undertaking and liability of the defendants, and the case turns upon the construction of the language of the contract, and especially upon the force and effect of the words "more or less" in the connection in which they are used therein. If the contractor was bound to deliver 880 cords of wood, no more and no less, under any circumstances, then the defendants were

bound to accept and pay for that quantity, and are answerable in damages if they have not done so upon the readiness and offer of the claimant to perform his part of the agreement.

The words "more or less" and their equivalent, "about," "say," and "by estimation" are frequently introduced into bills of sale and contracts to deliver goods, wares, and merchandise, following or qualifying a statement of specific quantity, weight, or bulk, and courts have been called upon to determine their force and effect upon the more certain and definite words to which they are attached, and how far the obligations of the parties are modified thereby. The judicial decisions have not uniformly followed the same interpretations of these words; but, in our opinion, the true rules, so far as this case is concerned, are the following, which we think are supported by judicial authority and justified on principle:

1. When the contract is for the sale or delivery of a specifically-named quantity of goods or articles, and the words "more or less" are added, with no reference to any other method of determining more exactly the quantity intended, or of removing the uncertainty created by those words, then the parties will be held to a quantity approximate to that specifically named, allowing only such a slight variation therefrom as, from the circumstances of the case, or the nature of the articles to be delivered, may seem to the court to be reasonable.

This was substantially the view taken by this court in Hardy vs. The United States, 9 C. C. R., p. 245. Hardy had, by contract, bound himself to transport, for the United States, 486 tons, more or less, of
27 stores from Hardyville to Fort Whipple, and 351 tons, more or less, from Hardyville to Camp Lincoln. While the contract was in force the defendants furnished only 78½ tons, leaving 758½ tons which were not offered for transportation. The court held that the exact number of tons, as qualified by the words more or less, "might be slightly varied by either party without infringing his obligation or in any way defeating the actual intent and meaning of the contract." "But," says Judge Milligan, in delivering the opinion, "the defendants had no more right to withhold one-half, one-third, fourth, or fifth of the number of tons mentioned than the claimant had to refuse to transport the same quantity when offered. To give the words more or less, or their equivalents, such an interpretation would defeat every contract into which they may be inserted, and render ineffectual all attempts to provide slight discrepancies which business or convenience may require." And the complainant had judgment for damages for the non-delivery by the defendants of 758½ tons specified in the contract.

In Cabot vs. Windsor et al., (1 Allen, 546,) which was an action upon a contract for the delivery of 500 gunny-bags, more or less, the supreme court of Massachusetts held the same doctrine; and Judge Bigelow, in his opinion, very clearly expresses the reasons for it. Referring to the words more or less, he says, "as applied to quantity, they are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically named as the subject of the contract. In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles before concluding the contract for the purchase, it is necessary and usual to insert the words 'more or less' or 'about' in connection with the specific amount which forms the subject of the contract, in order to cover any

variation from the estimate, which is likely to arise from difference in weight, errors in counting, diminution by shrinking, or other similar causes."

In each of these cases which we have cited, it will be seen that the contract was for a definite quantity, with the words "more or less" added thereto, without reference to any other method of determining and making certain what appeared to be rendered uncertain by the latter words. To give force to the words "more or less" in such connection to the full extent of their literal meaning would be to allow either party practically to avoid the whole contract, except as to the price of the goods actually delivered and accepted. This would be clearly an unreasonable construction, and not in accordance with the plain intent of the parties.

2. When the contract is for the sale or delivery of a specifically-named quantity of goods or articles, and the words "more or less" are added, with a reference to something by which the exact quantity intended can be ascertained and the uncertainty created by those words can be removed, then the words "more or less" will not be restricted to a small quantity, but will limit or extend the quantity expressed to that which may be determined by the reference, and the parties will be held to deliver and accept the latter quantity. (See Swilkie vs. Daniell, 2 Comp. Mees. and Roscoe, 61; Faure vs. Martin, 3 Selden, 210.)

The complainant's case comes within this second rule.

The contract upon which this action is brought is not for the delivery of 880 cords of wood, more or less, but for that quantity, "more or less, as should be determined to be necessary by the post-commander
28 for the supply, in accordance with Army regulations, of the troops and employés of the garrison of said fort for the fiscal year beginning July 1, 1871, and ending June 30, 1872." The necessities of the fort, as they should be determined by the post-commander, were to fix the quantity called for by the contract, and, by a reference to those necessities so determined, all uncertainty arising from the use of the words "more or less" might easily be removed.

That the reference to the necessities of the fort was inserted for the express purpose of limiting materially, if occasion should require, the estimated quantity previously stated, may be inferred from the circumstance that it was a judicious and cautious provision on the part of the quartermaster to prevent the terms of the contract from coming in conflict, under any circumstances, with that part of the act of March 2, 1861, which is now incorporated into the Revised Statutes as follows:

"SEC. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Had the deputy quartermaster contracted for the delivery of a definite quantity, supposing that it would be necessary during the current year, in the absence of fraud we have no doubt that the defendants would have been bound thereby, even if it proved in the end that a much less quantity only was necessary. But in this case the deputy quartermaster chose to refer to the necessities of the fort and the determination of the post-commander for the exact quantity required, and both parties agreed thereto by adopting the language of the contract which we have cited.

And there is other language in the contract which shows conclusively,

we think, that the words "more or less" were not intended to be restricted to a small variation only of the quantity named, but were to have their full force and effect, and that it was contemplated that the quantity, if the necessities required it, might be increased much beyond the 880 cords therein specified.

In the first article it is thus provided: "The delivery of 880 cords to be completed on or before January 1, 1872, but any additional number of cords of wood that shall be required over and above that amount may be delivered from time to time, regulated by the proper military authorities, based upon the actual necessities of the troops for the period above mentioned." Here we have the necessities of the troops referred to again, and provision made for allowing the contractor ample time for delivering whatever quantity those necessities should require above the 880 cords. This provision would have been wholly unnecessary and would certainly not have been inserted in the contract if it had been understood by the parties that the quantity would be increased above the 880 cords only to a very small extent. It implies not a slight and accidental increase arising from the ordinary course of business, but contemplates a large additional requirement under certain circumstances, and so large as to give the contractor further time in which to deliver the additional quantity. And the time of delivery was also to be regulated by the actual necessities of the troops for the period specified, precisely as the quantity, more or less, was to be regulated and determined. If, then, the quantity might be greatly enlarged above the 880 cords, should the necessities of the troops require it, so under the same language of the contract it might be greatly diminished according to such necessities.

29 The words "the delivery of 880 cords to be completed on or before January 1, 1872," taken by themselves, would imply an obligation to deliver that full quantity; but when taken in connection with the other provisions of the article, as they must be, it is clear that they do not extend the obligations of either party beyond the necessities of the fort, which were then estimated to require 880 cords, but were left to the future determination of the post commander.

This construction of the first article which we have adopted is in harmony with the language of the third article, where the same uncertainty is expressed by a reference to "any part of the 880 cords, more or less," and especially with the terms of the fifth article, wherein the defendants agree to pay the contractor the sum of $3.99 per cord for each and every cord of wood "delivered and accepted as specified in articles 1 and 2." The only express agreement of the defendants was to pay for what was accepted under the first and second articles, and the only implied agreement was to accept what wood the fort required for the fiscal year. This construction does not leave the words "880 cords" without force and effect under all circumstances, for unless the post commander should determine that the necessities of the fort would require a greater or less quantity, they would stand as fixing the quantity to be delivered and accepted.

When the contract was executed and delivered, but not before, it was the duty of the post commander to notify the claimant, within a reasonable time, of the extent of the necessities of the fort, if he determined that they would require a quantity of wood less than the 880 cords, and this he did with such promptness and care that no laches can be attributed to the defendants. As soon as he was informed of the execution of the contract, and only four days after it was signed, and twelve days before it went into operation, he notified the claimant, orally, that only

40 cords of wood would be required. And again, on the very day of the contract taking full effect, he repeated the notice to the claimant in writing. This was due diligence on his part. On the other hand, the claimant made haste to cut all the wood he supposed would be required, incurred great expenses in preparations for hauling, and actually hauled a part of it to the fort before the contract was signed. After the contract was executed, and before receiving notice of the quantity required, he hauled to the fort only 20 cords, and those had been previously cut, and he has been paid for twice that quantity by the defendants.

The fact that the commanding officer first disapproved of the action of the post commander in limiting the quantity to 40 cords does not alter the case, because he soon after reversed his own action, and it does not appear that the claimant incurred any expenses or delivered any wood in the mean time.

When it was ascertained what quantity of wood would be actually necessary for the supply of the troops at the post of Fort Pembina for the fiscal year commencing July 1, 1871, by the determination of the post commander, according to the terms of article one of the contract, and due notice thereof was seasonably given to the contractor, the obligations of both parties were fixed thereby, and the contractor was under no obligation to deliver, nor the United States to receive and accept, more than the 40 cords so determined to be necessary.

Whatever losses the claimant may have suffered by cutting and hauling more wood than the post commander determined to be necessary were caused by his own hasty and imprudent acts in commencing operations before the contract was signed, and before he had given the post commander the time and opportunity to determine the quantity required, and must fall upon himself, and not upon the defendants who have paid him for all they have accepted, and for all they were bound to receive.

For these reasons judgment must be entered that the claimant's petition be dismissed.

Several other defenses were made by the Attorney-General at the trial, but it is unnecessary to consider them, as those which we have reviewed are deemed sufficient to dispose of the case.

LORING, J., was not present at the trial of this case, and took no part in the decision.

In the Court of Claims of the United States.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK,
vs.
THE UNITED STATES.
No. 6410.

Request for additional findings by defendants.

The Attorney-General, on the behalf of the United States, requests the court to find additional facts, as follows:

1. That the notice mentioned in the second finding was given "on the 14th of June, 1871."

2. That the post of Fort Pembina did not need for the fisca year commencing July 1, 1871, more than the 40 cords which were acc pted by the defendants.

3. That the teamsters, teams, wood-haulers, and supplies taken from S't Cloud and Sauk Centre were brought to Pembina by the
32 claimant Myrick at the time or before the making of a contract (20th January, 1871) between him and the United States for the delivery of 1,000 cords of wood at Fort Pembina, and prior to the advertisement or opening of the bids under which the contract with Brawley was made.

4. What Brawley was to pay Myrick for the 840 cords of wood which he offered to furnish does not appear.

THOMAS SIMONS,
Ass't Att'y-General.

Filed December 28, 1875.

Upon the foregoing requests by the defendants for additional findings of fact the court makes the following orders:

1. The first request is denied in the form prayed for; but the court finds that "the claimant, Brawley, knew that the contract had been awarded to him previously to the 14th of June, 1871, when the written articles thereof were sent to him to be executed; but the date of
33 his first receiving notice of the award is not proved.

2. The second request is allowed.

3. The third request is refused because not warranted by the evidence.

4. The fourth request is allowed.

By the court.

34 In the Court of Claims.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN Myrick,
vs.
THE UNITED STATES. } No. 6410.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitors for the claimant for the allowance of an appeal, as filed in the clerk's office February 9, 1876, and of the order of the said Court of Claims allowing the same; of the finding of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the requests by the defendants for additional findings, and of the rulings of the court thereon.

In testimony whereof I have heureunto set my hand and affixed the seal of said court, at Washington, this fifteenth day of February, 1876.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 356. Daniel F. Brawley, for the use of Nathan Myrick, appellant, vs. The United States. Court of Claims. Filed 15th February, 1876.

Supreme Court of the United States.

OCTOBER TERM, 1877.

Calendar No. 356.

DANIEL F. BRAWLEY, FOR THE USE OF
NATHAN MYRICK,
Appellant,

vs.

THE UNITED STATES,
Respondent.

BRIEF AND ARGUMENT FOR APPELLANT.

JOHN B. SANBORN,
Att'y for Appellant.

Pioneer Press.

Supreme Court of the United States.

OCTOBER TERM, 1877. No. 356.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK,
Appellant,
vs.
THE UNITED STATES,
Respondent.

STATEMENT OF THE CASE.

Prior to April 14th, A. D. 1871, an estimate was made by the proper officer of the Quartermaster's Department of the Department of Dakota, that eight hundred and eighty cords of wood would be needed by the United States, at Fort Pembina, during the next fiscal year, commencing July 1st, 1871. Thereupon the Chief Quartermaster of the department advertised for proposals to furnish said eight hundred and eighty cords of wood.

Prior to the fifteenth day of April, when said bids were

to be opened, the appellant had made and filed the following proposal, viz :

Lieut. Paul Harwood,
A. A. Quartermasier, Fort Pembina, D. T.:

I do hereby agree to furnish, at Fort Pembina, D. T., (880) eight hundred and eighty, or more, cords of wood, at ($3.99) three dollars and ninety-nine cents per cord, in accordance with advertisement for proposals, which is hereto attached.

DANIEL F. BRAWLEY.

Sureties:

HENRY M. KENNEY.
N. E. NELSON.

The bids were opened April 15th, 1871, and the contract awarded to appellant May 6th, 1871, and he was then duly notified of the same. The contract set forth in the petition was made out and executed by the Deputy Quartermaster General, then Chief Quartermaster of the Department of Dakota, on the same day. The appellant executed the same on the 14th day of June, A. D. 1871; and prior to that day, having learned that he was the successful bidder, had cut and secured, ready for delivery under said contract the whole eight hundred and eighty cords of wood. The contract price for the same was three dollars and ninety-nine cents ($3.99) per cord. The United States refused to receive more than forty cords of this wood, and there was no market value in A. D. 1871 for the wood not received, but two years afterwards, and after this action was commenced, the 840 cords were sold to a government con-

tractor for three dollars and sixty-two and one-half cents per cord, and the appellant had the benefit of said sale. The contract, made in pursuance of said proposals and upon which the suit is brought, contained the following provisions and stipulations, viz.:

I. That the said Daniel F. Brawley, his heirs, assigns, administrators and executors, shall sell, furnish, and deliver, cut and split in lengths of four (4) feet, duly piled or corded, under the direction and supervision of the post quartermaster, within the enclosure of the post of Fort Pembina, Dakota Territory, eight hundred and eighty (880) cords of sound, of first quality of merchantable oak wood, more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1st, 1871, and ending June 30th, 1872. The delivery of eight hundred and eighty (880) cords to be completed on or before January 1st, 1872, but any additional number of cords of wood that may be required over and above that amount may be delivered from time to time, regulated by the proper military authorities, based upon the actual necessities of the troops for the period above mentioned; provided, that if the wood be less than four (4) feet in length due allowance shall be made for such shortage, by an increased quantity, the cubical contents of the wood being measured in all cases. Delivery on this contract to begin on or before July 15th, 1871, unless the time be extended by the commanding officer of the post.

II. That the said wood shall be subject to such inspec-

tion as the said Lieut. Col. S. B. Holabird, Deputy Quartermaster General, United States Army, party of the first part, may deem necessary to determine the quality, quantity, and condition at time of delivery, and whether the terms of this contract have been fully complied with.

The inspection shall be made, as the wood is delivered, by one or more officers, and, after delivery. by a board of officers, to consist of three company commanders present, or of such company commanders less than three, and of such company officers next in rank, as shall complete the number, and no payment shall be made without the proceedings of such a board be attached to the voucher in each case, unless modified by the special authority of the department commander.

III. That in case of failure on the part of the said Daniel F. Brawley, his agents, heirs and assigns, party of the second part, to deliver any part of the eight hundred and eighty (880) cords, more or less, of wood, as stipulated by this contract, then the said Lieutenant Colonel S. B. Holabird, Deputy Quartermaster General, U. S. A., his agent or successor, party of the first part, shall have power to supply the deficiency, by purchase or otherwise, and the said Daniel F. Brawley, his heirs and assignees, party of the second part, shall pay the difference in cost, using any money due the contractor at the time of such failure to pay the difference on supplying the deficiency above mentioned.

The Court of Claims held that the words in the first stipulation of the contract, "*more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with Army Regulations, of the troops*

and employees of the garrison of said post for the fiscal year, beginning July 1st, 1871, and ending June 30th 1872," left the whole question of the amount of wood to be received under said contract with the post commander, and that therefore no action could be maintained for damages on account of the government not receiving 880 cords, and adjudged that appellant's petition be dismissed.

ASSIGNMENT OF ERRORS.

The said Daniel F. Brawley says, that in giving the judgment aforesaid in the record aforesaid contained there is manifest error in this, to-wit: The said Court of Claims, after finding that the defendant, through the legally constituted authority, had estimated for eight hundred and eighty cords of wood to supply the wants of Fort Pembina for the fiscal year ending June 30th, A. D. 1872, and had advertised for proposals for furnishing the same, and received from the appellant a proposal to furnish *eight hundred and eighty cords of wood* or more for three dollars and ninety-nine cents per cord, and had awarded to him the contract of furnishing the wood on that proposal, and executed a contract in due form whereby said appellant became bound to furnish to the United States eight hundred and eighty cords of sound of first quality of merchantable oak wood, more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with Army Regulations, of the troops and employees of the garrison of said post for the fiscal year ending June 30, 1872, and the United

States had agreed to pay him therefor three dollars and ninety-nine cents per cord, and that said appellant entered upon the performance of said contract, and did perform the same, and that the United States refused to receive from him or pay for more than forty cords of said wood, and that there was no market value for the balance of eight hundred and forty cords of said wood, did adjudge that the appellant was not entitled to the contract price of said wood nor to any damages whatever, and that his said petition be dismissed.

And there is also an error in this: That said Court of Claims did decide and adjudge that a post commander of a military post, after a proper estimate for supplies for a current fiscal year for said post has been duly made, and a contract to furnish the same been concluded, that the United States could under the law diminish said amount when the literal terms of the contract so provide, or increase the same in its discretion.

And there is also error in this: That said Court of Claims did decide that in the case of a contract between the United States and another party to deliver a certain amount of quartermasters' supplies, more or less, as shall be determined to be necessary by the post commander, &c., that the post commander has in law authority to modify said amount to any extent, even to reduce the same in the proportion that forty bears to eight hundred and eighty.

And there is an error in this: That said Court of Claims did decide and adjudge that the bid made pursuant to proposals for supplies published according to law, when duly accepted by the government, and record made and notice given as provided by law, constitute no part of the

contract made in pursuance thereof, and cannot be considered as a part of the *res gestæ* in determining what the contract actually was, notwithstanding the provision of the statutes that all purchases and contracts for supplies shall be made by advertising a sufficient time previously for proposals respecting the same.

POINTS OF LAW.

I. Where the law provides that certain contracts shall be made by advertising a sufficient time previously for proposals respecting the same, the reception and opening of bids and proposals, and a record of the same, it is competent and necessary in the construction of the contract, and the determination of any doubtful provisions therein, to consider the advertisement, proposal, acceptance and notice in connection with the contract, to ascertain what the precise intention of the parties was at the time of making the same.

Greenleaf on Evidence, vol. 1, p. 122, sec. 8; also, pp. 129, 130, 131, 132, 133, 134, and authorities.

Robinson vs. Fiske, 25 Maine, 401.

Higgins vs. Wasgalt, 34 Maine, 305.

Metcalf vs. Taylor, 36 Maine, 28.

Wilson vs. Troup, 2 Cowen, 196.

In the construction of a written contract, the court must place itself in the situation of the contracting parties at the time of its execution, and look at the occasion that gave

rise to it, the relative position of the parties, and their obvious designs as to the objects to be accomplished.

II. When the Chief Quartermaster of a military department advertises for proposals for a specific amount of supplies for the United States, to be furnished and delivered in the remote frontier, and therefore requiring a large expenditure in preparation for the performance of the contract, and receives and accepts a proposal for that amount of supplies, or more, and notifies the party making such proposal of its acceptance, who thereupon, before the contract is signed, makes full preparation to fulfill said contract on his part, the United States cannot, through its post commanders, or any other officer, reduce the amount of supplies to be received to a mere nominal quantity, without responding in damages, if any sustained, to the party making said contract; even though the formal contract provides that the quantity shall be the proposed amount, more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, &c. The officer required by law so to do, having made an estimate before such advertisement and proposal, the United States are concluded by the same, and having negotiated with reference to a fixed and specific quantity, and designated said quantity in the contract, the United States must stand to the same. If a specific quantity is not designed, it should not be mentioned. Fair dealing prohibits it, and the United States, above all others, should deal openly and fairly.

III. In all cases where the words "more or less" are used in an executory contract, in connection with a definite and fixed quantity, the law will give them only such force

as may be necessary to relieve the parties to said contract from the precise quantity. A fixed quantity, with these words added in such contract, can in no case have the force of the words "so much as may be required."

Benjamin on Sales, 2d edition, pp. 569, 570 and 571, and authorities cited.

IV. All contracts for supplies of the army are required to be made on estimates, and hence, for specific quantities; but, under the construction of the Court of Claims, this contract was made for so much wood as the post commander might see fit to accept, or as should be needed.

This would have made the contract unlawful, and courts will not presume that officers of the executive department designed to act unlawfully, or to enter into unlawful contracts; especially when a different construction of their contracts, not less rational, will bring their acts and contracts within the provisions of the law.

ARGUMENT.

The main salient point of this case, striking the legal mind at the first glance, is a plain, palpable wrong and injury committed against the appellant, and the holding of the court below that there is no remedy in the law. For all the facts were before that court in the petition and evidence, and all found by the court, and still the judgment is that no relief can be granted.

Consider an exact parallel of this case between two individuals.

A, desiring to have provided for his use wood one year in advance of his immediate necessities, at a remote point from market on the frontier, has empowered B to make estimates and determine the amounts necessary; and when this is done, has empowered C to make a contract for the supply of the same in a certain manner, viz.: He shall advertise for proposals, receive those only accompanied by the names of two good sureties that if the award is made upon the proposal the party making it will enter into that contract and perform the same. D makes his proposal, accompanied by the names of his sureties to furnish the amount estimated for, or more, at $3.99 per cord, and is notified that his bid is accepted, and the contract is made out by A's agent and signed by A, and sent to D to execute. D, being under bonds virtually to execute the contract and perform the same, immediately, and before formally signing the contract, enters upon the performance thereof, and incurs great expense, and does all necessary to its fulfilment. After this, and when he comes to execute the contract, he finds words in it not before seen, capable of two constructions, viz.: the amount is limited by the words "more or less," as shall be determined by another agent; and this agent disregards wholly the amount upon which all the other agents have acted, and so modifies the same as to make it equivalent to an utter disregard of the spirit of the contract made by the proposals and acceptance and all the acts of the parties, unless, possibly, the last one of signing such a contract. Thus, in the outset, the question of gravest importance is met, can a citizen be compelled to sustain such a wrong and injury and find no redress in the law? If, to prepare to fulfill such a contract,

an expense of two hundred thousand dollars had been necessarily incurred, instead of two, the result with the law as held below, must be the same; and the law, instead of affording adequate remedy, is wholly powerless. Nor can it be said that the appellant's loss is through his own fault; that he should not have signed such a contract. But his proposal had been accepted, and he had given surety that he would execute the contract and perform under it. The delivery of the wood was to commence by July 15th following. The place was away from all markets and from civilization some three or four hundred miles. Under these circumstances, was he not right in proceeding at once with his preparations to perform the contract? And when, after all this preparation, the contract as signed was presented to him, could he be expected to reject it when dealing with sovereign authority, and by raising questions lose all the expense incurred in preparation?

Now, we will concede the proposition that a contract is not finally closed until executed by both parties. But one proposition upon which we rely largely in this case is this: That when an agent of another has authority to make contracts under certain circumstances, and only by certain negotiations in writing first had, that after the contract has been made all these writings connected with the negotiations may be properly resorted to, and considered by the court in determining what the exact contract between the parties was; that is, that when one party claims one construction and the other party another, that the writings may be resorted to for elucidation and explanation of the ambiguous terms of the contract.

Now, the appellant claims that the words "more or less,

as the post commander shall determine," signified only such small variations as the post commander should deem unimportant, and never for a moment considered that if the post commander should decide that the necessities of the garrison would require fifteen hundred cords, that the appellant would have the right to furnish it under this contract, and that no new contract for the same could be let that year by the United States. Nor did he once consider that he would not be allowed to furnish 880 cords. Under all the circumstances, the cost of providing the forty cords received was more than half the cost of supplying the whole eight hundred and eighty. He was asked by the United States to make proposals to furnish, and to make provision for furnishing, eight hundred and eighty cords of wood. His proposal was based upon that amount. Now, suppose he had been asked to make proposals for forty cords, to be delivered at the same place during the same time. The bid, instead of being three dollars and ninety-nine cents, would more likely have been thirty-three dollars and ninety-nine cents. Therefore, when a contract is completed, the negotiations maturing into an executed contract clearly become a part of the same; and shall not all that has been written by either party in relation thereto be considered with it in determining what the contract really is, and how it shall be construed? Section 3744 of the General Statutes is in the following words:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under

them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return,"—sustains the theory that all these papers should be taken and construed together. The contract, thus considered, can leave no doubt on any mind that it provided for the delivery of eight hundred and eighty cords of wood; that the appellant was under contract to furnish that much, and the United States to receive the same.

Again, the appellant claims that the court erred in applying the second general rule of construction laid down for the words "more or less."

It is conceded that, if one party sells to or buys of another a tract of land known to both, or a quantity of material known to both, and the words expressing the quantity are qualified by these words "more or less," then a fair construction of these words will allow of any departure or variation from the specified quantity that upon close examination is found to exist. And the reason is plain. Both parties have dealt and contracted with reference to a specific thing, and not with reference to the

quantity of that thing. Each has relied upon his own estimate or judgment of the amount, and must abide by that judgment.

Such was the case in Faure vs. Martin, 3d Selden, cited by the learned court in the opinion. "I agree with the learned judge who presided at the circuit, in the opinion that the sale was one in bulk, and not by the acre," (3d Selden, 218) say the court in their opinion. The lot and farm *were sold in gross*, and conveyed by a deed containing the words more or less, because neither party professed to know the precise quantity contained within the boundaries of the deed, no court ought to interfere to make a new contract for the parties which they did not think proper to make for themselves. Hence, in the construction of these words, the paramount question must always be, in what sense did the parties to the contract use them.

What was the controlling element operating upon the understanding and directing the will in making the contract? If it was to buy a certain tract of land, or a certain bulk of material of any kind, the words, more or less, will have the effect of limiting the contract to the tract of land, or material, under consideration, without any regard to the estimate made by the parties, whether the same should prove approximate or remote from the actual quantity.

The paramount idea in the mind in this case is a specific thing, not the quantity or amount of that thing. Hence, if the appellant had in possession a pile of wood that both he and respondent estimated to be eight hundred and eighty cords, and the respondent had said, I will buy your pile of wood near Fort Pembina and pay therefor three thousand two hundred dollars, or at the rate of four dollars

a cord, and the appellant had sold the same for that sum and described the quantity as eight hundred and eighty cords, more or less, both parties having equal knowledge, and both acting in good faith, the words more or less would qualify the quantity, in that case, to the actual amount of wood in the pile, whether the same should be eight hundred and eighty, fourteen hundred and eighty, or eighty cords, although such wide discrepencies would go far towards making out a *prima facie* case of fraud in a case where fraud was pleaded.

But when the words more or less are used in an executory contract for supplying material when the cost of the material depends largely, almost wholly, upon the amount required by the purchaser, and hence the quantity is the main element bearing upon the understanding and will and leading to the execution of the contract, the law will give them no more force than is necessary to cover such slight variations as must always occur in the transactions of men of this character. As in this case the parties have chosen to designate and deal with reference to a fixed quantity, and having so elected must stand to that quantity, and this rule of construction must be applied to such cases when a fixed quantity is named, and where parties do not design to come within the rule fixed quantities must not be named.

Neither public policy nor the custom of the service will permit contracts for so much supplies as may be necessary for the fiscal year. But all purchases are and must be made upon estimates of amounts required first obtained and hence with reference to a given quantity.

And if in this case the amount of supplies was to be so much as the post commander should find necessary for the

wants of the garrison, why was eight hundred and eighty cords named at all. Surely an attempt to mislead men to furnish supplies for less than a quarter of their value to the United States, by false representations of the quantity that will be required, will meet with no favor in the law nor in the courts.

The judgment of the court below should therefore be reversed and judgment ordered for the plaintiff for the contract price of eight hundred and forty cords of wood, deducting therefrom what the court shall find the same to have been worth on the first day of January, A.D. 1872, the first day when the breach of the defendant was complete as to all said wood.

JOHN B. SANBORN,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

DANIEL F. BRAWLEY, FOR THE USE OF NATHAN MYRICK, APPELLANT,
vs.
THE UNITED STATES, APPELLEES.
No. 356.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

DANIEL F. BRAWLEY, FOR THE USE OF Nathan Myrick, appellant,
vs.
THE UNITED STATES, APPELLEES. } No. 356.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I. *If anything be recoverable, it is only* $306.60.

The 840 cords not received were afterward sold by claimant for $3.62½ per cord. (Record, p. 11.) The contract price being $3.99 per cord, (Record, p. 13,) claimant's loss was only the difference between these two prices; that is to say, $840 \times 36\frac{1}{2}$ cents = $306.60.

II. *Under the contract set forth there is no ground for the recovery of any amount.*

1. The amount of wood to be furnished under the contract was (Record, p. 12) "eight hundred and eighty (880) cords of sound, of first quality, of merchantable

oak wood, *more or less as shall be determined to be necessary by the post commander* [my italics] for the regular supply, in accordance with Army regulations, of the troops and employés of the garrison of said post for the fiscal year beginning July 1, 1871, and ending June 30, 1872."

The particular quantity specified (880 cords) is obviously limited by the rest of the clause, making it subject to the determination of the post commander.

2. The obligations of the respective parties were determined *by the contract*, in which all previous negotiations were merged. If the claimant chose to incur the risk of cutting 880 cords of wood before the contract was executed, he cannot call upon the United States to indemnify him for the consequences of such indiscretion.

3. If the contract materially differed from the terms specified in the proposals, or in his bid, he was not bound to execute it. By voluntarily executing a contract which left the quantity of wood to be furnished to the determination of the post-commander, he waived all claim with respect to wood then cut, which should exceed the quantity to be so determined.

4. The contract, by its terms, referred claimant, in regard to the quantity of wood to be furnished, to the post-commander, who was bound to inform him within a reasonable time how much would be required. This was done. The contract was executed June 14, 1871; the performance of it was not to commence till July 1; and on June 18, immediately on being informed of it, the post-commander notified claimant that only forty cords would be required. (Record, pp. 10, 11.)

5. The proposals and the bid having been merged in the contract, cannot be set up against it. The only

case in which previous negotiations are admissible in evidence is where they serve to explain what is doubtful or ambiguous in the contract in which they terminate. But this exception has no applicability here, because, first, the clause in question, read entire, presents not the slightest ambiguity, and, secondly, the proposals and bid are relied on, not to explain the contract, but to contradict it.

In support of these propositions I cite the following authorities:

7 Wall., 331, Grant *vs.* The United States. Contract "to furnish all the supplies that may be needed in Arizona until the 20th of March, 1862." It was held that to recover for a breach by rescission the claimant must prove that the supplies delivered after the rescission were needed.

2 Cromp., M. & R., 71, 72, Gwillin *vs.* Daniell. Defendant had agreed to sell, and plaintiff to purchase, all the naphtha defendant might make in the next two years, "say from 1,000 to 1,200 gallons a month," at 2*s.* 6*d.* per gallon. The breach alleged was that the amount manufactured by defendant fell short of that agreed, by 7,000 gallons. On demurrer to the declaration, it was held that the word "say" meant merely that, in all probability, the quantity of naphtha produced would amount to 1,000 or 1,200 gallons a month. The court said: "The contract in reality was this: 'I undertake to sell to you all the naphtha that I may make in my works during the next two years.' That it might probably amount in quantity to 1,000 or 1,200 gallons per month was no part of the contract."

3 Camp., 58, Hayward *vs.* Scougall. The contract was, "Sold for Messrs. Scougall & Co. all the sound

Riga Ryne hemp that may be loaded by the Pilgrim, Webster, and one or two other ships, not exceeding 300 tons, now at Riga, by the supercargo of said vessels, or Messrs. Schmids & Co., the agents of the concern, the names of the ships to be given up when received, at 81*l.* per ton," &c. Only 71 tons were shipped. Held, that defendants sold only what they supposed their agents would ship for them. The court said: "They say in substance, 'We will sell you all that our agents at Riga ship for us, to the amount of 300 tons. If they send us so much, you shall have it; if they send us none, we have sold none to you.'"

5 Gray, 589, Pembroke Iron Co. *vs.* Parsons. The contract was to sell a cargo of iron, "to be shipped per bark Charles William, at $30 per ton—about 300 or 350 tons." Only 227 tons were delivered. The registered tonnage of the bark was shown to be only 298 tons. The court said that the subject of the sale was "a cargo per bark Charles William." They add, "It was then limited and measured by the quantity she could carry at once. Whether the plaintiffs knew of the capacity of that vessel or not is immaterial, because they agreed to and adopted it as the description and measure of their purchase."

8 Pet., 181, Robinson *vs.* Noble's admrs. Plaintiff contracted to transport for defendant a certain quantity of subsistence stores, "supposed to amount to about 3,700 barrels," for which defendant was to pay him $1.50 a barrel. Only 3,105 were furnished for transportation. Held, that defendant did not contract to deliver any specific number of barrels.

1 Otto, 324, Lobenstein *vs.* The United States. Claimant, by two contracts, was to have all the hides of beef

cattle slaughtered "for" the Indians at Camp Supply during a certain period named; but, by direction of the Commissioner of Indian Affairs, the cattle were turned over to the Indians on foot, so that none were slaughtered "for" the Indians at all. By one of the contracts the number of hides was to be "about 2,000, more or less;" and by the other contract, "about 4,000, more or less." It was held that the number specified could not have been understood to be guarantied, as neither party could determine how many cattle would be reserved for the Indians by the Commissioner.

S. F. PHILLIPS,
Solicitor-General.